No. 99-840

IN THE

Supreme Court of the United States

MARK SUSSMAN, KER GERRIN, PERRY CARTER, SIMONE LUND, VANESE MCNEIL, AMIN A. FARUQI, BETTY KOSS, ROBERT BOZOYAN, LILIAN HEDRICK, EVANGELINE RAGASA, CHRISTOPHER ROGERS, PATRICIA HOPKINS, DERRICK C. LESHURRE, DEANNA WILLIAMS, CANDICE A. DONOFRIO, CLAYTON A. MCVICKER,

Petitioners,

v.

AMERICAN BROADCASTING COMPANIES, INC., THOMAS ALBERT OETGEN, STACY LESCHT, IRA ROSEN, RICHARD KAPLAN, WALTER PORGES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT PURSUANT TO RULE 29.6

Respondent American Broadcasting Companies, Inc. is a wholly-owned subsidiary of ABC, Inc., which is a wholly-owned subsidiary of Disney Enterprises, Inc., which is a wholly-owned subsidiary of The Walt Disney Company, which is a publicly held company.

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INTRODUCTION

A unanimous panel of the Ninth Circuit Court of Appeals held that respondents' actions did not violate section 802 of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2511 (1994). Petitioners ask this Court to review that determination primarily because it is supposedly in conflict with the decisions of three other circuits. Respondents file this brief in order to demonstrate that no such conflict exists and that no important and unsettled issue of federal law is raised by the petition.

RESPONDENTS' STATEMENT OF THE CASE

The petitioners in this action were employed by the Psychic Marketing Group ("PMG") as "psychic advisors" who provided advice to telephone callers for a fee. As part of an investigation by American Broadcasting Companies, Inc. ("ABC") into PMG's telemarketing practices, ABC asked a young intern named Stacy Lescht to obtain a job as a "psychic telephone advisor" at PMG. In September 1992, while working in PMG's Los Angeles offices, Ms. Lescht surreptitiously recorded her conversations with some of the petitioners.

On February 18, 1993, ABC's "PrimeTime Live" news program included a story about the psychic telemarketing industry and PMG. The report included some of the videotape footage shot by Ms. Lescht at PMG. More than a dozen PMG employees and former employees initiated this suit against ABC and others in September 1994, although only a few of the plaintiffs had actually been shown in the broadcast. The plaintiffs asserted various state law claims and a claim for federal statutory eavesdropping pursuant to 18 U.S.C. § 2511.

In February 1997, the District Court granted the defendants' motion for summary judgment as to all claims. Although plaintiffs initially appealed from the judgment in its entirety, they subsequently abandoned their appeal with respect to their state law claims. The sole issue addressed by the Ninth Circuit, therefore, was whether the District Court had correctly held that plaintiffs had failed to come forward with evidence sufficient to support a verdict in their favor on the essential elements of their federal eavesdropping claim.

In an opinion authored by Judge Kozinski on behalf of a unanimous panel, the Ninth Circuit affirmed the entry of summary judgment. *See Sussman v. American Broadcasting Companies, Inc.*, 186 F.3d 1200 (9th Cir. 1999). The Court of Appeals' opinion began by setting out the relevant statutory provision, 18 U.S.C. § 2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such an interception *unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.*

Id. at 1201-2 (emphasis in opinion).

The Court then noted that because Ms. Lescht was always a party to the conversation being taped, the case turned on the underscored portion of the statute, which asked

whether the taping was "for the purpose of committing any criminal or tortious act." *Id.* at 1202. The Court rejected the notion that all that ABC need show to escape liability is that a purpose of the taping was to gather newsworthy material. Instead, the Court held that plaintiffs could prevail if they established that *one* of ABC's purposes in taping the conversations was to commit a crime or tort. *Id.*[1] The Court held that summary judgment was nevertheless proper because "plaintiffs have produced no probative evidence that ABC had an illegal or tortious purpose when it made the tape." *Id.* at 1203.

The Court of Appeals also considered the legal argument that petitioners advance in their petition: that liability is automatically established under 18 U.S.C. § 2511 if the taping *itself*, regardless of its purpose, is illegal or tortious under state law. *Id.* at 1202-3. The Court rejected this contention:

> This argument finds no support in the statute. Under section 2511, "the focus is not upon whether the interception itself violated another law; it is upon whether the purpose for the interception — its intended use — was criminal or tortious." *Payne v. Norwest Corp., 911 F.Supp. 1299, 1304 (D. Mont. 1995), aff'd in part and rev'd in part, 113 F.3d 1079 (9th Cir. 1997).*

1. Petitioners repeatedly misrepresent this holding by the Court in their petition. They contend that the Court of Appeals held that 18 U.S.C. § 2511(2)(d) "immunizes" and gives a "free pass" to any media defendant who merely claims that one of its purposes was newsgathering. Petition, pp. i, 2, 22. As noted above, the Court of Appeals in fact rejected that very argument. *Sussman*, 182 F.3d at 1202.

> *See also Deteresa v. American Broad. Cos., 121 F.3d 460, 467 n.4 (9th Cir. 1997)* (emphasizing the distinction between a taping that is itself tortious or criminal, and one carried out for the purpose of committing some other crime or tort). Where the taping is legal, but is done for the purpose of facilitating some further impropriety, such as blackmail, section 2511 applies. Where the purpose is not illegal or tortious, but the means are, the victims must seek redress elsewhere."

Id.

The plaintiffs did not seek rehearing by the panel or by the Circuit *en banc*.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION IN THIS CASE AND ANY REPORTED DECISION FROM ANY OTHER COURT OF APPEALS

In their petition to this Court, petitioners seek review primarily because, they claim, other circuits have held that 18 U.S.C. § 2511 is violated whenever the making of a tape itself violates the statutory or common law of the state in which the tape was made. Petition, p. 18. Petitioners assert, erroneously, that the Seventh Circuit so held in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995). In *Desnick*, plaintiff brought suit against ABC in connection with an ABC news report about unnecessary ophthalmic surgery. In the course of its investigation, ABC had sent individuals to eye clinics who

had videotaped their encounters with clinic staff. *Id.* at 1348. Plaintiffs — a clinic and two of its surgeons — brought suit for defamation, fraud, trespass, and violation of federal and state eavesdropping statutes. On appeal from a Rule 12(b)(6) dismissal, the Seventh Circuit reversed the dismissal of the defamation claim, but affirmed the dismissal of the plaintiffs' other claims. *Id.* at 1355.

Petitioners assert that the Court of Appeals held in *Desnick* that 18 U.S.C. § 2511 would have been violated if plaintiffs there had been able to plead that the taping itself violated some other law or constituted a tort. Petition, p. 18. The Court did not so hold. Instead, Judge Posner's opinion for a unanimous panel in *Desnick* utilized the *precise* analysis employed by the Ninth Circuit in the instant case:

> The federal and state wiretapping statutes that the plaintiffs invoke allow one party to a conversation to record the conversation unless his purpose in doing so is to commit a crime or a tort or (in the case of the state, but not the federal, law) to do "other injurious acts." 18 U.S.C. § 2511(2)(d); Wis.Stat. § 968.31(2)(c). . . . The defendants did not order the camera-armed testers into the Desnick Eye Center's premises in order to commit a crime or tort. Maybe the program as it was eventually broadcast was tortious, for we have said that the defamation count was dismissed prematurely. But there is no suggestion that the defendants sent the testers into the Wisconsin and Illinois offices for the purpose of defaming the plaintiffs by charging tampering with the glare machine. The purpose, by the plaintiffs' own account, was to see whether the Center's

> physicians would recommend cataract surgery on the testers.

Desnick, 44 F.3d at 1353.

It is thus clear that both the Ninth Circuit in the instant case and the Seventh Circuit in *Desnick* looked to whether an *intended use* of the tape was a criminal or tortious one. This interpretation of 18 U.S.C. § 2511(2)(d) dates back at least to 1971, when the Eighth Circuit observed that

> it seems apparent from the context in which [18 U.S.C. § 2511] was enacted that the sort of conduct contemplated was an interception by a party to a conversation with an *intent to use* that interception against the non-consenting party in some harmful way and in a manner in which the offending party had no right to proceed.

Meredith v. Gavin, 446 F.2d 794, 799 (8th Cir. 1971) (emphasis added). The Seventh Circuit reached the same conclusion in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956, 959 (7th Cir. 1982), a case involving a tape that had supposedly been made in an effort to acquire evidence for use in litigation. In affirming the district court's dismissal of a section 2511 claim, the Seventh Circuit, in another opinion by Judge Posner, pointed out that:

> . . . while it is even conceivable that [the party making the tape] if he had gotten the admissions he was hoping for would have used the recording to blackmail [the opposing party] rather than to bolster [his] antitrust suit and that this was his real purpose in making the recording, *no evidence*

> *of such an intent was presented below* — and [the opposing party] had the burden of proving unlawful purpose.

Id. at 960 (emphasis added). *See also Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402, 406 (Minn. App. 1995) (holding that even though journalists were purportedly trespassing when they taped portions of a story inside plaintiffs' home, no federal eavesdropping claim could be stated where the taping was not itself done for the purpose of committing the trespass).

In short, there is no split between the Courts of Appeal on the question presented by petitioners here. While petitioners also cite several district court opinions that supposedly conflict with the instant case, a purported conflict between a Court of Appeals decision and a district court decision is not among the conflicts listed in Rule 10 as providing a basis for review by writ of certiorari. Moreover, only one of the two district court opinions cited by petitioners appears to address the question presented here. In *Menda Biton v. Menda*, 796 F. Supp. 631 (D.P.R. 1992), the district court entered summary judgment on a federal eavesdropping claim brought by a stockbroker against several clients who had taped their telephone conversations with him. The defendants filed no papers in opposition to the stockbroker's motion for summary judgment. *Id.* at 632. The district court's short opinion granting the unopposed summary judgment motion states in part that section 2511(2)(d) makes it unlawful "to intercept a telephone conversation in *states* where such interception constitutes crime or tort." *Id.* at 633 (emphasis in original). The court cited no authority for this proposition. Respondents have been unable to locate any

subsequent opinion relying upon *Menda Biton* in this regard, and petitioners do not cite any such case.

The other district court opinion cited by petitioners is completely inapplicable here. In *Deal v. Spears*, 780 F. Supp. 618 (W.D. Ark. 1991), the defendants were not parties to any of the conversations that they taped. Accordingly, the portion of the statute at issue here was not discussed either in the district court's opinion or in the Eighth Circuit's opinion affirming the District Court's judgment for the plaintiff. *See Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992).

II. THE PETITION RAISES NO IMPORTANT AND UNSETTLED ISSUE OF FEDERAL LAW

A. State Law Provides Redress For The Types Of Wrongdoing Identified By Petitioners

As established above, there is no conflict between the Courts of Appeals on the question of law presented by this Petition. Instead, the Courts of Appeals that have applied 18 U.S.C. § 2511(2)(d) have each held, as the Court of Appeals did here, that "[w]here the purpose [of the taping] is not illegal or tortious, but the means are, the victims must seek redress elsewhere." *Sussman*, 186 F.3d at 1203. As this passage implies, the subjects of surreptitious recordings can, and often do, assert claims under *state* law for invasion of privacy or for violation of state statutes pertaining to electronic eavesdropping. Petitioners do not contend that these state statutes or common law rights are ineffectual; indeed, they point out that another subject of the same ABC broadcast at issue here obtained a substantial jury verdict in his favor "on the tort of intrusion." Petition, pp. 4-6 and n.7. State law thus provides a ready means to redress the various

torts and crimes identified by petitioners. The fact that the petitioners in *this* case allowed the limitations period on their state law claims to expire before bringing suit, *see* Petition, p. 17, does not justify the expansive interpretation of 18 U.S.C. § 2511 that they advance.

B. The Court Of Appeals' Interpretation Of 18 U.S.C. § 2511 Is Fully Consistent With Congressional Intent.

Petitioners also assert that review is appropriate here because the Court of Appeals' interpretation of 18 U.S.C. § 2511 "imputes to Congress a bizarre intent that contravenes logic . . . ," and they argue that the "will of Congress hang[s] in the balance." Petition, p. 29. In fact, the Court of Appeals' interpretation is fully consistent with Congress' desire, as reflected in a 1986 amendment to 18 U.S.C. § 2511, that section 2511(2)(d) should not act as a "stumbling block" in the path of journalists who record their own conversations. S. Rep. No. 99-541, 99th Cong. 2d Sess. (1986), p. 17, *reprinted at* U.S. Code Cong. & Admin. News 1986, p. 3571. The 1986 amendment eliminated language that had created liability for those who taped conversations "for the purpose of committing [an] injurious act." The Senate Report that accompanied the legislation stated that:

> Many news stores have been brought to light by recording a conversation with the consent of only one of the parties involved — often the journalist himself. Many news stories are embarrassing to someone. The present wording of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under Section 2511, even if the

> interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort.

Id.

In sum, when Congress last addressed 18 U.S.C. § 2511(2)(d), it *narrowed* its scope, after acknowledging that "many" news stores had resulted from surreptitious tape recordings by journalists. *Id.* It is thus highly unlikely that Congress intended that section 2511(2)(d) create automatic *federal* criminal liability for journalists or others whenever a *state's* statutory or common law barred surreptitious taping. In addition, since each of the Courts of Appeals that had applied section 2511(2)(d) prior to the 1986 amendment had looked to whether the *intended use* of the tape was criminal or tortious, Congress may be presumed to have had knowledge of, and to have approved, that interpretation of the statute. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 870 (1978).

Petitioners obviously disagree with the policy choices made by Congress, as demonstrated by their vitriolic attacks upon journalists who utilize recording devices. Petitioners' policy arguments should be addressed to Congress, however, or to state legislatures, not to this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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